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No. 85-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. SIMPLOT, J.R. SIMPLOT COMPANY, SIMPLOT INDUSTRIES, INC., P.J. TAGGARES, P.J. TAGGARES COMPANY and SIMTAG FARMS,

Petitioners,

v.

JOSEPH STROBL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 31, 1985

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QUESTION PRESENTED

The question raised by the petition does not present any conflict between circuit courts, was correctly decided by the Court below, and was originally raised as only an afterthought argument. It is as follows:

> 1. Does a vicious price-fixing conspiracy carried out in both the cash and futures contract portions of the potato market, by supposed competitors in the purchase of potatoes, and culminating in the largest default in the history of futures trading, somehow win immunity from the antitrust laws because it was so large that it also violated portions of the Commodity Exchange Act, where (a) Congress recognized the extreme danger of price-fixing conspiracies utilizing commodity futures markets by broadening in 1890 the scope of the Sherman Act in order to be sure to prohibit such conspiracies, (b) Congress again recognized such dangers in 1973-74 in the Commodity Exchange Act, wherein it expressly sought to retain such Sherman and Clayton Act prohibitions and court jurisdiction, and (c) no claim is or could be made that the classic price-fixing conspiracy was governmentally compelled.

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Petitioners,

v.

JOSEPH STROBL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Joseph Strobl requests that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, which affirmed a final judgment of the United States District Court for the Southern District of New York which, in turn, upheld a jury verdict in its entirety. See Appendix.

Petitioners J.R. Simplot, P. J. Taggares *et al.* (sometimes hereinafter referred to as "defendants" or "petitioners") seek review of the Second Circuit's decision that their vicious price-fixing conspiracy which was so broad that it also violated various provisions of the Commodity Exchange Act (the "CEA") did not thereby become so large as to somehow win immunity from the prohibitions of the federal antitrust laws.

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

We accept petitioners' statements here except to note that Section 2(a)(1) of the CEA, 7 U.S.C. § 2 is also at issue; that the judgment was for $1,263,500.00 not $1,380,000 (*compare*, Appendix ("A") p. 53 with Petitioners' Brief ("PB") p. 2.); and that respondent disputes that this Court should grant the writ.

STATEMENT OF THE CASE

PETITIONERS' SOLE ARGUMENT HERE WAS AN AFTERTHOUGHT IN THE COURTS BELOW, WHICH THE DEFENDANTS NOW ATTEMPT TO SUPPORT BY RE-WRITING THE FACTS

1. *Underlying Facts.* Defendants belatedly raised an anti-trust argument below (see 2 *infra*). They have now re-cast the facts at issue in order to serve this afterthought argument and delay justice by the amount of time inherent in the certiorari process. Contrary to defendants' new version of the facts, however, this is not merely a "futures" market case; rather, it is a potato price-fixing conspiracy carried out in both the futures contract and cash portions of the potato market.

For example, the defendants were, and are, large supposed competitors in the purchase and processing of cash market potatoes. Their potato purchasing season is largely from March to May, the alleged conspiracy period here. During this time in 1976—and while defendants were purchasing over a billion pounds of potatoes—the supposed competitors had repeated intercommunications about potato prices and undertook numerous joint and individual actions in the cash and futures markets that were *per se* unlawful or highly unusual and which each had the effect of creating the appearance of a glut or oversupply of potatoes. See A. p. 26.

Such actions included, but were not limited to, the following: sending "roller cars" of unsold potatoes to eastern cash markets; selling contracts on futures markets to deliver (and representing to the potato markets the existence of) millions of pounds of Maine potatoes which defendants did not own; refusing to buy back those contracts on the futures market; and refusing to buy Maine potatoes on the cash markets in order to deliver in satisfaction of their futures contracts. By the latter step, for which defendants indemnified their brokers in order to gain their support, the supposed competitors perpetrated the largest default in the history of commodity futures trading in this country; it was highly publicized and destroyed the contract requirement on which futures depend for the theoretical vitality and validity of their trading prices: the delivery of the actual commodity. See A. pp. 27-30.

Thus, the conspiracy of the supposed competitors greatly profited their respective businesses (a) by fixing and depressing the prices they paid for potatoes that year and thereafter (*e.g.*, A. pp. 3-57), and (b) by discrediting and destroying the utility of the Maine potato futures contract as a beacon for fair prices in the cash potato markets (as defendants knew from their earlier default experience with Idaho potato futures, defaults destroy futures contracts).

Lower Court Proceedings. Plaintiff sued to recover, and was awarded, a sum equalling the difference between what he sold his Maine futures contracts for and what he would have sold them for in a fair market absent defendants' price-fixing.

Prior to trial, the antitrust argument here was never raised, although defendants' excellent counsel made numerous unsuccessful motions, *e.g.*:

> (a) to suppress mention of: (i) prior felony convictions of Simplot and Simplot Co. regarding false tax returns (denied), (ii) previous consent orders of Simplot and Taggares relating to May 1971, 1974, and 1976 potato futures contracts (granted in part, and denied in part),

and (iii) deposition testimony of a witness to the effect that Taggares encouraged him to join the conspiracy (denied) (the prior felony convictions and the admissions were NOT used by plaintiff at trial, but the deposition was used);

(b) to obtain partial summary judgment against proof of non-futures market damages on the antitrust claim of a plaintiff in a consolidated case (denied);

(c) to dismiss the Commodity Exchange Act claim (denied); and

(d) to preclude or permit use of miscellaneous other evidence, including an administrative decision in a proceeding in which Simplot had asserted his Fifth Amendment privilege against self-incrimination due to a pending criminal antitrust grand jury investigation, and Simplot and Taggares had accepted substantial penalties, including six and four year trading suspensions (denied).

Thus, despite years of preparation and despite making all these other unsuccessful motions prior to trial, defendants' excellent counsel apparently did not see their present antitrust jurisdiction issue as worthy of mention. Rather, the first time it was mentioned was after plaintiff had rested his case. And, again on the appeal, this belated argument was raised only as the third point in defendants' brief. It is now the sole ground on which defendants seek certiorari.

ARGUMENT

"Summary of Argument and Reasons For Denying Certiorari"

The writ should be denied for the following reasons.

There is no conflict between circuit courts. See Point III A *infra.*

There is no meaningful conflict between any court; and no conflict on the facts between the circuit court below and the cited district court opinion; moreover, the lone district court opinion which creates the meaningless conflict on the law not only has been repeatedly rejected by the decisions since but was based on obvious infirmities and an apparent failure to follow controlling law in its own circuit. See Point III B *infra.*

The statute at issue was later amended in material aspects not considered by the Court below. See Point III C *infra.*

Petitioners' real argument for certiorari is the asserted erroneousness of the decision below. However, the decision below was correctly decided; analyzing, point-by-point, the four points which petitioners asserted to be errors therein, serves only to demonstrate thoroughly that there was no error, see Points I-IV, and that defendants' petition here is, in view of their vicious price-fixing conspiracy and purposeful destruction of a market, an affront to the certiorari process.

POINT I

THE DECISION BELOW IS CORRECT BECAUSE COMMON SENSE, CONGRESS, AND THE COURTS ALL DISAGREE WITH DEFENDANTS' PROPOSITION THAT THERE IS NO DIFFERENCE FOR COMMODITY PRICE-FIXING PURPOSES BETWEEN THE COMMODITY FUTURES AND SECURITIES MARKETS

Defendants argue that the decision below was incorrect, that certiorari should be granted, and that their gargantuan price-fixing conspiracy here should be immunized from prosecution, under the Sherman Act, 15 U.S.C. § 1, for the following reason: supposedly there "is no reason why the federal antitrust laws should apply in one case [commodity futures markets] while not in the other [securities markets]." P.B. Point III, p. 15 (as all concede, fixing prices of securities is not, of itself, remediable under the Sherman Act). This would be a very weak point for certiorari, if even it were true.

However, it is false. And one need not be a farmer in order to understand that there are many reasons why the decision below was correct that commodity futures are different from securities insofar as commodity price fixing is concerned.

First, the most basic common sense indicates that the supposed competitors in the purchase of potatoes here could not have implemented, and need not have abused, the securities markets as an essential step in their potato price-fixing conspiracy to profit their processing operations; that the stock and options markets do not serve, while commodity futures markets do serve, as a price beacon for processors, producers, farmers, and users of commodities; and that securities are solely pieces of paper while commodity futures are contracts contemplating the delivery of, and becoming the actual commodity (unless a default occurs).

Taking only one snippet of testimony from the trial below is also instructive on this commodity price-discovery difference between securities and commodity futures:

> Q. You made reference in your last answer, Mr. deMerchant, to action on the Mercantile Exchange relating to trading the cash market. Does the Mercantile Exchange reported prices affect the cash market?
>
> A. Yes, they do. They lead the market up, and if it is in reverse, it leads the market or it will floor the market real fast.
>
> Our market moved quite fast with the Mercantile.
>
> Q. Are the Mercantile Exchange Maine potato futures contract prices reported in the state of Maine?
>
> A. In every potato business office, in every farm machinery office, in every fertilizer company office, anybody that's got anything to sell to the farmer, there was a ticker tape or there was a bulletin board or something. It was kept in front of everybody. Compare, A. pp 26-27.

The prices of securities were not and are not so reported. Thus, besides all the other differences between securities and commodity futures, there is one characteristic possessed by the latter but not by the former which of itself, merits different antitrust treatment: commodity futures have the power to set and affect, and do daily set and affect, cash commodity prices, but securities do not have this power. The "roller cars" and all the other cash market actions undertaken by defendants in their conspiracy at bar were effective for the defendants and damaging to fair prices and appearances; but the most effective and damaging of all was the futures market price-fixing because those polluted prices were instantaneously reported and read throughout the United States, and drove down potato prices all over; as the lower potato prices were reported in the terminal and shipping markets, they drove down prices, etc.

Moreover, Congress, in creating the Sherman Act in 1890, recognized these basic, common-sense commodity price-fixing

differences between our securities and commodities futures markets, and recognized that nowhere is a price-fixing conspiracy so dangerous as when it operates on a commodity futures market whose prices are nationally reported. For example, there is no mention of the securities markets made in the legislative deliberations culminating in the passage of the Sherman Act (despite the then-long existence of the securities markets). However, despite their relatively recent inception, commodity futures markets figured prominently in such deliberations.

Indeed, during the debates preceding the passage of the Sherman Act in 1890, Senator Ingalls of Kansas actually introduced an amendment to the Sherman Act that would have taxed out of existence those dealing in commodities futures contracts, in their entirety! 21 Cong. Rec. 2462-63 and 2648 (1890). See also *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 544 n. 40 (1944). Senator Sherman himself spoke in favor of the amendment, finding that it went to the very purpose of his proposed act! 21 Cong. Rec. 2652 (1890).

However, after four days of debate, the bill was sent to the Senate Committee on the Judiciary, of which Senator Ingalls was a member. That Committee then redrafted the bill to insert the broad and sweeping language which it contains today, and to delete the Ingalls amendment, with various members of the Committee drafting different sections; Senator Ingalls is reputed to have redrafted Section 8. 16 J.O. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATIONS Sec. 2.02[4] at 2-33 to 2-34 n. 116 (1984). The bill in its new, sweeping form was then submitted to a vote, fully supported by Senator Ingalls and the other proponents of the Ingalls amendment, and passed 52 to 1. 21 Cong. Rec. 3152-53 (1890).

Confirming that the language of Section 1 was broadened expressly in order to be sure to cover, *inter alia*, futures contracts, when the movement to tax futures out of existence

again gathered steam in 1892, Senator Hoar, a member of the Senate Judiciary Committee which rewrote the Sherman Act, confirmed that to the extent such futures and options activities were immoral or reprehensible, they were already actionable under the antitrust laws:

> MR. HOAR: I was about to say that my question relates to immoral contracts, contracts either in restraint of trade or establishing monopolies mingling with the honest commercial transactions some taint of immorality or wrongdoing or fraud . . . If it does come within that class it will be prohibited by the authority of the court as an obstruction against commerce."

24 Cong. Rec. 32 (1893).

From that time onwards, the Supreme Court regularly applied the antitrust laws to a wide variety of commodities markets. *See, e.g., Swift & Co. v. United States*, 196 U.S. 375, 394-400 (1905) (combination of fresh meat dealers fixing and rigging prices to induce cattlemen to send their livestock to the Chicago markets is within ambit of antitrust laws); *United States v. Patten*, 226 U.S. 525, 541-43 (1913) (conspiracy to run corner solely on New York Cotton Exchange was of itself an unreasonable restraint of trade and commerce among the States and would, therefore, inflict upon the public injuries which the Sherman Act was designed to prevent); *Chicago Bd. of Trade v. Olsen.*, 262 U.S. 1, 39-40 (1923) (while holding the Grain Futures Act constitutional, Court states that manipulations of futures which unduly depress prices of grain in interstate commerce fall under ambit of *Patten* and the antitrust laws, and that the Sherman Act's passage by itself appeared to have reduced or to be reducing dangerous tendencies in commodity futures).

Consistent with this solid Supreme Court precedent, federal courts have repeatedly applied federal antitrust laws to commodity futures transactions prior to the 1974 amendments to the CEA. *See, e.g., Miller v. New York Produce Exch.*, 550 F.2d 762, 766-68 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977)

(claims under CEA and Sherman Act entertained simultaneously but jury correct to dismiss charges for lack of evidence); In re *Ira Haupt & Co.*, 398 F.2d 607, 610 (2d Cir. 1968)(antitrust treble damages action against various commodities exchanges and brokers by brokerage firm in bankruptcy); *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 299-300 (2d Cir. 1965) (complaint against New York Produce Exchange and brokers under antitrust laws dismissed for lack of specificity with leave to file an amended complaint); *Cargill, Inc. v. Board of Trade*, 164 F.2d 820, 823 (7th Cir.), *cert. denied*, 333 U.S. 880 (1948) (deciding whether certain actions of the Exchange constituted price-fixing or illegal restraint of commerce under the antitrust laws); *Peto v. Howell*, 101 F.2d 353, 360 (7th Cir. 1938) (evidence showing that trader purchased corn futures in order to fix or increase prices, was substantial proof of price-fixing and a private suit for treble damages antitrust violation was permitted); *United States v. Sugar Inst.*, 15 F. Supp. 817, 896 (S.D.N.Y. 1934), *mod. on other grounds*, 297 U.S. 553 (1936) (market where members tacitly agree to maintain "public" prices on prior agreement, is violative of Section 1 of the Sherman Act).

Indeed, it could be said that the decision below was controlled by *United States v. Patten, supra*, and *Peto v. Howell, supra*. At the very least, these decisions show that there is no lack of harmony between the decision below and those of the Seventh Circuit or this Court.

Further, the United States Department of Justice and the Federal Trade Commission have long investigated commodity futures price disorders as being violative of the Sherman Act. *See New York Coffee and Sugar Exchange*, 3 CCH Trade Reg. Rep. Paragraph 25,364 (F.T.C. 1955); Federal Trade Commission, *Economic Report of the Investigation of Coffee Prices* (1954); Federal Trade Commission, *Report of Economic Effects of Grain Exchange Actions Affecting Futures Trading During the First Six Months of 1946* (1947); and Report of the

Federal Trade Commission on the Grain Trade, Volumes 1-7 (1922-1926), see particularly Volume 7, Effects of Futures Trading (1926).

Finally, legal scholarship has asserted that due to the price discovery and price-setting function of commodity futures, restraints of trade therein (such as the dangerous one at bar) are so deleterious that not only Sherman Act prosecution for retrospective award of damages, but also Commodity Exchange Act regulation for injunctive cessation thereof and rules prospectively to prevent same, are required. *See The Coffee Exchange Debacle: Highlighting The Need for Further Regulation of Futures Trading Through The Sherman Act And The Commodity Exchange Act*, 64 Yale L.J. 906, 915 (1955).

In sum, defendants are incorrect, the decision below was very correct and there are many good reasons why commodity futures are different from securities for purposes of Sherman Act commodity price-fixing conspiracies. Such reasons range from common sense, to the legislative history of the Sherman Act, to the treatment by the courts, government attorneys, and legal scholars. And they clearly demonstrate that the decision below is very correct; that defendants' glib suggestion of equal treatment of securities and commodity futures is clearly incorrect in this context; and that at the very least, this asserted reason clearly is no basis upon which certiorari should be granted.

POINT II

THE DECISION BELOW WAS CORRECT IN PERMITTING THE PRICE-FIXING CLAIM HERE, AND SUCH WAS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE 1973-74 AMENDMENTS TO THE COMMODITY EXCHANGE ACT

With the underlying facts and historical and legal treatment thus, placed in their proper perspective, we turn now to defendants main, or at least first, point for certiorari: the decision below is supposedly in conflict with (the legislative history of) the 1973-74 amendments to the Commodity Exchange Act wherein Congress (supposedly) repealed the antitrust laws with regard to price-fixing conspiracies as large as the one here. Again, however, the decision below was clearly correct and there is no conflict between it and the Commodity Exchange Act.

Defendants concede that Section 1 of the Sherman Act, by its terms, clearly prohibits their gargantuan price-fixing conspiracy with its tentacles in both the cash and futures portions of the potato markets. And the most basic common sense indicates that immunizing this classic price-fixing conspiracy from Sherman Act prosecution would be ludicrous.

But defendants say this Court should adopt this ludicrous result because three bills were introduced but never enacted in Congress in 1973-74 that would have provided treble damages for every violation of every section of the Commodity Exchange Act. The failure to enact these bills repealed the antitrust laws, defendants say, by evidencing a Congressional intention to eliminate a treble damages remedy for every antitrust violation that might also be argued to be also a Commodity Exchange Act violation, *i.e.*, a price-fixing conspiracy so large and vicious that it also violates the CEA, wins immunity from treble damages. P.B. pages 8-14.

However, the failure to enact these introduced bills, which were apparently never discussed in Congress, is not necessarily or reasonably suggestive of an intent to extirpate the antitrust laws. See A. p. 12. At most, it is suggestive of a Congressional intent neither to expand nor to contract any treble damage remedies. Therefore, defendants offer grossly insufficient evidence of legislative intent to obtain what they seek: the ludicrous immunization of a price-fixing conspiracy which was neither compelled nor permitted by the Commodity Exchange Act, and which is clearly prohibited by the Sherman Act.

The fundamental and important national policies embodied in the antitrust laws have been vindicated in this Court's repeated emphasis that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and not to be casually inferred. *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963); *Pan American World Airways v. United States*, 371 U.S. 296, 304-05 (1963); *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962); *United States v. Borden Co.*, 308 U.S. 188, 197-206 (1939); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 314-15 (1897); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1102 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 234 (1984); especially where the conduct giving rise to the claimed exemption is the result of a business decision (such as defendants' decision here to conspire to drive down potato futures prices and destroy the futures contract by defaulting, all in order to profit their businesses) and is not the product of regulatory coercion. *National Gerimedical Hosp. and Gerontology Center v. Blue Cross*, 452 U.S. 378, 390 (1981); *Otter Tail Power v. United States*, 410 U.S. 366, 374 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 339 and 346 (1959).

Indeed, this distinction between governmentally-compelled action and voluntary, reprehensible price-fixing is even made in defendants' own case, *Terminal Warehouse Co. v. Penn R.*

Co., 297 U.S. 500 (1936). There the Court took pains to point out that insufficient facts existed to indicate any price-fixing or other conspiracy; that, had such facts been present, such violations would have been remediable under the Sherman Act and the Clayton Act, 15 U.S.C. § 15; and that, thus, the Court's true holding was that the fact record conclusively established that the discriminatory practice, "far from being a symptom of a large combination, was the product of a mistake of law which was shared for many years by the regulatory commission". *Id.* at 515-16.

Thus, this Court may well ask itself, where is defendants' claim of government compulsion? Or are they glibly proposing a ludicrous rule of statutory construction that would emasculate the antitrust laws in our regulated society by leaping from statute to statute and repealing the antitrust laws and immunizing classic price-fixing conspiracies wherever single damages could be argued to be available under a regulatory statute. Not only is the portion of the legislative history of the 1973-74 amendments of the Commodity Exchange Act which defendants point to an insufficient evidence of legislative intent, but other portions thereof conclusively demonstrate the Congress expressly retained (and did not reject) Sherman Act jurisdiction.

Thus, and first, during the process of enacting the 1974 amendments, the United States House of Representatives ("House") Agriculture Committee rebuffed intense efforts, and unanimously struck from the original draft of the 1974 amendments an exemption for commodity futures transactions from coverage under the antitrust laws. *See* Hearings on S.2485, S.2578, S2837 and H.R. 13113 before the United States Senate Committee on Agriculture and Forestry, 93rd Cong., 2nd Sess., at page 259 (hereinafter "Senate Hearings at ____"); Hearings on H.R. 11955 Before the House Committee on Agriculture, 93rd Cong., 2d Sess., at page 249 (1974); Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture, 93rd Cong., 1st Sess., at page 121 (1973). Con-

gress never again even considered an antitrust exemption provision.

Second, in creating Section 201(b) (Section 2 of the CEA today) of the bill it reported out (H.R. 13113), the House Agriculture Committee granted certain jurisdiction in favor of the proposed CFTC. The wording of this grant did not suggest to Agriculture Committee members arguments about an implied repeal because such members knew they had just unanimously eliminated all antitrust exemptions. The House's legal experts in the Judiciary Committee later became concerned, however, about implied repeal or preclusion of remedy arguments being wrongly implied from the wording as then phrased. Thus, and third, in order to set the matter straight, on May 14, 1974, Congressman Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, took time away from the historic Watergate matters then consuming his committee and all of Congress, to submit his testimony before the United States Senate Committee on Agriculture and Forestry; the sole reason for his concern, and that of the House Judiciary Committee, was the retention of antitrust jurisdiction over price-fixing in futures after passage of the new legislation. Congressman Rodino decried recent anticompetitive (price-fixing) practices in wheat, soybeans, and corn futures contracts apparently similar to (though not necessarily involving direct competitors in the use of the product) the alleged price fixing conspiracy here. A. p.13.

Furthermore, he extolled the importance, indeed the "urgency", of preserving the jurisdiction of antitrust laws over such anticompetitive practices in the commodity futures markets. Moreover, in page after page of analysis, he quoted various government studies similarly extolling the "urgency" of such jurisdiction. Finally, he urged that a specific proviso be inserted in the CEA so that "unequivocal" antitrust jurisdiction would be applied "unequivocally" to anticompetitive practices in commodity futures contracts, and so that any possibility of preclusion or implied repeal agreements would be

eliminated. Congressman Rodino successfully urged that a specific savings clause be inserted into the 1974 amendments to the CEA so as to insure that the antitrust laws applied unequivocally to commodity futures contract trading. A. pp. 12-14.

In a similar vein, Senator Herman Talmadge, Chairman of the Senate Agriculture Committee, later explicitly confirmed, and further evidenced, the specific Congressional intent to develop a provision preserving antitrust jurisdiction over the transactions here and to eliminate any possibility of preclusion or implied repeal arguments. In response to a Justice Department official's criticisms and suggestions similar to those of Congressman Rodino, Senator Talmadge emphasized that in his view neither his committee nor the House had any intention of depriving either state or federal courts from antitrust jurisdiction. Senate Hearings at 664.

The legislative history to the 1974 amendments is also replete with other evidence, from figures equal to and lesser than these Committee Chairmen, that Congress specifically intended to preserve antitrust jurisdiction and prevent preclusion or implied repeals. *See, e.g.*, Statement of Keith Clearwaters, Deputy Assistant Attorney General, Department of Justice (antitrust laws should continue to apply to commodity exchanges), Senate Hearings at 663; Statement of James T. Halverson, Director, Bureau of Competition, Federal Trade Commission (conduct which may have the approval of the CFTC should not be immune from scrutiny by the antitrust enforcement agencies), Senate Hearings at 667-68; Statement of Glenn Willet Clark, Professor of Law, Drake University Law School, Des Moines, Iowa (federal courts should retain antitrust jurisdiction over conduct regulated by the CFTC), Senate Hearings at 683-84.

Thus, Congress laid to rest any doubts about the "unequivocal" application of the antitrust laws over anticompetitive practices in commodity futures contracts upon the conclusion of the 1974 hearings, by inserting and enacting the antitrust

preservation proviso recommended by Congressman Rodino to preserve antitrust jurisdiction over anticompetitive practices in corn futures contracts, soybean futures contracts, wheat futures contracts, and—we respectfully submit—over the potato futures contracts at bar. It reads as follows: "Nothing in this Section shall supersede or limit the jurisdiction conferred on Courts of the United States or any State." Section 2(a)(1) of the CEA, 7 U.S.C. Section 2. As the legislative history quoted at length above has shown, by this specific proviso, Congress specifically intended to preserve, and did preserve, Sherman and Clayton Act antitrust jurisdiction over the classic price-fixing conspiracy here. This proviso and the clear Congressional intent behind it clearly mandate that certiorari be denied and that defendants be liable for their antitrust violations here. *See* 120 Cong. Rec. 30,459, 34,997 (1974).

POINT III

THERE ARE NO CONFLICTS BETWEEN CIRCUIT COURTS; THERE ARE NO MEANINGFUL CONFLICTS ON THE FACTS UNDER THE CITED CASE; THE DISTRICT COURT DECISION ASSERTED TO CAUSE CONFLICTS IS INFIRM AND IGNORED CONTROLLING LAW IN ITS OWN CIRCUIT; AND, EVEN IF THERE WERE CONFLICTS, THE STATUTE HAS BEEN AMENDED IN MATERIAL RESPECTS

A. There Are No Conflicts Between Circuit Courts

Defendants' next reason for certiorari is that "a conflict exists between the Second and Seventh Circuits on the issue of treble" damages and on "the appropriate approach to statutory construction and application." P.B. Point II. Defendants are as wrong here as they are on the other points.

First, defendants' own argument reveals that *all* decisions in all Circuits reject treble damages in the securities manipulation context (no conflicts here) and that only one district court decision has rejected the antitrust laws in the commodity

futures context (see *infra*). Therefore, no conflicts exist between circuit courts.

B. There Is No Meaningful Conflict and No Conflict On the Facts

Second, the courts which have considered any price-fixing conspiracy or facts similar to the facts proved here, have agreed with the courts below that no antitrust immunity exists. *See Pollock v. Citrus Assoc.*, 512 F.Supp. 711, 716 (S.D.N.Y. 1981) *Strax v. Commodity Exch., Inc.*, 524 F.Supp. 936 940 (S.D.N.Y. 1981); *Goldschmidt v. Hunt*, 556 F. Supp. 123 (N.D. Tex. 1983); *Apex Oil Co. v. Joseph DiMauro*, 82 Civ. 1796 (S.D.N.Y. July 29, 1983), (unreported memo decision). Therefore, no conflict exists.

Further, defendants' asserted conflict is not meaningful. This asserted conflict arises from one lone district court decision, *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979). *Smith* primarily involved bucketing of orders, not price-fixing, and held over six years ago that the antitrust laws were precluded. Thus, it is different on the facts. Today, *Smith v. Groover* stands by itself: the first decision written on this subject, *albeit* on different facts, and the *only* one to find the antitrust laws precluded. The decisions written since then have explicitly rejected the reasoning of *Smith v. Groover*. Therefore, *Smith v. Groover* simply cannot serve to suggest a conflict warranting certiorari here. *See Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-3 (1923).

C. Smith v. Groover is Infirm and Ignores Controlling Law In Its own Circuit.

Apart from its rejection by all other courts, *Smith v. Groover* suffers from an internal infirmity: it relies on and attempts to import wholesale into an analysis of the Commodity Exchange Act, the analysis of the securities laws by the decisions in *Schaefer v. First National Bank of Lincolnwood*,

326 F. Supp. 1186 (N.D. Ill. 1970) and 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). First, nowhere in all the law could an analogy to an entirely different statutory scheme be more meaningless than in the area of finding an implied repeal of the antitrust laws, where each statute must be analyzed on its merits. See Point II *supra*.

Second, in the passage of the Securities Exchange Act of 1934 (the "1934 Act"), Congress expressly intended to define and limit the right of action for stock manipulation, see 15 U.S.C. Section 78i(e), Section 9a(e) of the 1934 Act (express action and attorneys' fees permitted) but *Congress included NO* such limitations or express actions in the CEA it passed in 1974 and that was analyzed by the Court below. Similarly, in passing the 1934 Act, Congress intended courts to have "exclusive jurisdiction" of stock manipulation under the 1934 Act, and to limit to "actual damages" all recoveries in private actions involving stock manipulation. See 15 U.S.C. Section 78aa and 15 U.S.C. Section 78bb, Sections 27 and 28 of the 1934 Act. Again, nothing similar existed in the CEA. Finally, no cases predating the 1934 Act had applied the antitrust laws to securities markets—again, precisely the opposite of the situation regarding the CEA. All of these considerations were expressly relied on as part of the rationale for the *Schaefer* court decisions, see 326 F.Supp. at 1192 and 509 F.2d at 1300-01.

Finally, as we have already seen, Congress did expressly intend to reach commodity futures in passing the Sherman Act (Point I *supra*), and did expressly intend to preserve this jurisdiction in passing the CEA (see Point II *supra*). Similarly, the Seventh Circuit had previously recognized antitrust private treble damage suits against futures market manipulations, *see Peto v. Howell*, *supra*, but the *Smith* court apparently ignored even this controlling law in its own circuit.

Comparing these infirmities and all the other distinctions of *Smith v. Groover* to the decision and situation here, we see that there is no meaningful conflict, particularly under defen-

dants' cited case, *Shapiro v. United States*, 335 U.S. 1 (1948). *Shapiro* accompanied an appeal (not certiorari) which the Court took for review in *United States v. Hoffman* 335 U.S. 77 (1948); unfortunately, defendants do not reveal or deal with this in their brief, although they do cite to a page in the *Hoffman* opinion without even mentioning that it was a separate case and decision. Moreover, again totally unlike the situation at bar, the Court was there faced with two contemporaneous, directly conflicting lower court decisions. Finally, and again totally unlike the situation at bar, the Court still felt compelled to emphasize that the compulsory testimony statute there at issue was essentially incorporated into twenty-seven (counsel's count) individually enumerated federal statutes and that the conflict there at issue could be expected to be occurring often. *Shapiro*, *supra*, 335 U.S. at 6-7 fn. 4. Thus, the certiorari circumstances of *United States v. Hoffman* are far different from those here such that the absence here of the important factors there would seem to compel denial of certiorari.

Therefore, no erroneousness exists in the decision below; no conflict exists in the circuits courts; and no meaningful conflict exists between any courts under even defendants' cited cases.

D. Even if a Conflict Did Exist, The Statute Has Been Amended.

Even if a conflict did exist, the CEA was amended by the Futures Trading Act of 1978, 92 Stat. 865 (1978), and the Futures Trading Act of 1982, 96 Stat. 2294 (1983). The Court below took pains to emphasize that those amendments were not at issue because the price-fixing conspiracy occurred in 1976. See A.7. fn. 1. Therefore, the statutes are different; moreover, they are materially different. The latter amendments were adopted in response to futures industry lobbying after *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) had upheld implied private rights of action under the CEA. Futures brokers sought, and obtained, express rights of action, with recovery limited to only the actual

damages suffered, and new elements imposed in order to establish liability. Various other alterations in the statutory scheme were made which expressly excluded or otherwise affected other remedies and jurisdiction. Therefore, certiorari should obviously be denied. Compare *United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952); *Sokol Bros. Co. v. Commissioner*, 340 U.S. 952 (1951); *United States v. Beal*, 340 U.S. 852 (1950); *United States v. Wilkinson*, 355 U.S. 839 (1957); as described in *Berger v. United States*, 170 F.Supp. 795 (S.D.N.Y. 1959).

POINT IV

DEFENDANTS' LAST ARGUMENT FOR CERTIORARI IS INSUBSTANTIAL

Defendants' last argument for certiorari is that the decision below will open the courts to numerous decisions which are incorrect in unspecified ways. This argument requires no response because, as has already been demonstrated, the decision below was correct regarding the facts, the legislative history to the Sherman Act, the numerous previous applications by courts of the Sherman Act to the commodity futures markets, and the 1973-74 amendments to the Commodity Exchange Act which serve to preserve that jurisdiction.

Contrary to defendants' ludicrous assertion (P.B. p.5), numerous courts have previously recognized a general principle upholding antitrust claims where the conspiracy involved was so large that it also violated a regulatory statute. *See, e.g., Terminal Warehouse Co.* v. *Penn. R. Co., supra*; *MCI Communications* v. *American Tel. & Tel. Co., supra*; *see also* cases cited in Point II generally. And, of all the different commercial contexts and different conceivable combinations of regulatory statute and antitrust considerations, nowhere could this general principle possess a more just, economically sound, and socially wise application than to the vicious price fixing conspiracy

perpetrated by the petitioners at bar in order to depress prices and destroy a market via the largest default in history of the commodity markets. Nowhere could this principle find a more legally sound basis than in the instance of the 1973-74 amendments to the Commodity Exchange Act which expressly sought to retain "unequivocally" court jurisdiction over Sherman Act violations, which themselves were enlarged expressly in order to be sure to outlaw the vicious conspiracy here.

CONCLUSION

The decision below is very sound and very just; there are no conflicts between the circuits and no meaningful conflicts between any courts whatsoever; the petition is an affront to the process; and certiorari should be denied in all respects.

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